



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

MAR 18 2011

OFFICE OF
REGIONAL COUNSEL

REQUEST AND DEMAND LETTER
URGENT LEGAL MATTER
PROMPT REPLY NECESSARY
FEDERAL EXPRESS NEXT DAY DELIVERY

Clara Connor, Division Engineer
United States Department of Transportation
Federal Highway Administration
Western Federal Lands Highway Division
610 East Fifth Street
Vancouver, Washington 98661-3893

Re: Request for Performance of Cleanup Actions
Avery Landing Site, Shoshone County, Idaho

Dear Ms. Connor:

The Avery Landing Site located near the town of Avery in Shoshone County, Idaho ("Site") is contaminated by releases and discharges of oil and hazardous substances. This contamination has also been impacting the St Joe River immediately adjacent to the Site. Records in the possession of the United States Environmental Protection Agency ("EPA") indicate that the Federal Highway Administration ("FHA") has jurisdiction and control over property interests held by the United States at the Site. Our records also show that after the United States obtained this property through an eminent domain proceeding in 1986, FHA conducted relocation and construction work on a roadway currently referred to as "State Route 50."

EPA is preparing for cleanup of the Site beginning in the 2011 work season, and hereby requests the participation of FHA in the upcoming work. This request is based on responsibilities entrusted under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") and the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("CWA").

In Executive Order 12580, January 23, 1987, the President delegated certain CERCLA authorities to departments of the United States, including the United States Department of Transportation ("DOT"). Among the delegated powers was cleanup responsibility for releases of hazardous substances on properties under the jurisdiction, custody or control of DOT. As the office within DOT which has jurisdiction and control over contaminated property at the Site, EPA construes FHA as having responsibility under CERCLA for the performance of removal actions to cleanup this contamination.

The participation of FHA in cleanup of the Site may also be obtained under CWA. EPA has authority under Section 311(c) of CWA, 33 U.S.C. § 1321(c), to direct and monitor Federal action to remove a discharge of oil and hazardous substances, and to mitigate or prevent a substantial threat of discharge of oil and hazardous substances. Further, according to Section 313(a) of CWA, 33 U.S.C. § 1323(a), each department, agency, or instrumentality of the Federal Government with jurisdiction over property of the United States may be obligated to undertake action to control and abate water pollution. Given these authorities, EPA construes FHA has having responsibility under CWA for the performance of cleanup actions at the Site.

Site Work

An assessment by the state of Idaho ("State") in 1991, and a follow-up inspection by EPA in 1993 confirmed that there were ongoing discharges of oil and possibly hazardous substances from the Site to the St. Joe River. Under oversight by the State, work was then undertaken by Potlatch Corporation in an attempt to prevent further discharges to the river. This work primarily consisted of the construction of free product recovery trenches and the operation of an oil water separator in 1995, and the construction of a vertical barrier containment system and a series of free product collection wells in 2000. Following each these efforts, however, there continued to be discharges of oil and possibly hazardous substances to the St. Joe River.

In 2007, EPA determined that an Engineering Evaluation and Cost Analysis ("EE/CA") was needed in order to more fully evaluate the threats presented by oil and hazardous substances at the Site, and to identify the actions which could be taken to abate such threats. EPA is now nearing completion of the EE/CA process, and in anticipation of having cleanup actions initiated at the Site during the 2011 work season, EPA is interested in obtaining a commitment from FHA to participate in the performance of these actions.

Request

EPA requests that FHA enter into an agreement which commits FHA to perform removal actions determined by EPA to be necessary for property of the United States at the Site which is under the jurisdiction and control of FHA. It may be that the anticipated work of FHA will either be undertaken in conjunction with or subsequent to other cleanup work to be conducted elsewhere at the Site. Included with this letter is a draft agreement setting forth proposed terms for performance of the work by FHA. The proposed agreement has been prepared based on the authorities of CWA, not CERCLA, in part due to EPA's understanding that FHA has not as yet received a delegation of CERCLA authorities from DOT.

EPA is interested in knowing within ten (10) days of today's date whether FHA is amenable to the approach toward cleanup of the Site outlined in this letter. FHA participation in the cleanup of a portion of property at the Site in a manner consistent with Federal authorities would be an extremely important contribution to the overall cleanup work at the Site.

Records

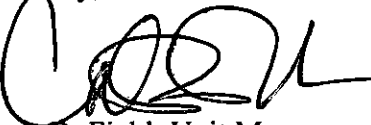
EPA has begun to establish an administrative record that contains documents which serve as the basis for selection of the cleanup actions for the Site. A copy of the current administrative record, including the EE/CA, is available for public review and comments at the Avery Community Center/Library located at 10 Depot Road in Avery, Idaho. Copies of the current administrative record are also available for public review and comments at the EPA, Region 10, offices located at 1910 Northwest Boulevard, Suite 208, in Coeur d'Alene, Idaho, and at 1200 Sixth Avenue in Seattle, Washington. To arrange an appointment in advance of reviewing the copy of the administrative record at the latter location, please contact the Superfund Records Center at (206) 553-4494.

Contacts

The Federal On-Scene Coordinator for the Site is Earl Liverman. EPA is also represented by Richard Mednick, Associate Regional Counsel, in this matter. Mr. Liverman may be reached at telephone number (208) 664-4858 and electronic mail address liverman.earl@epa.gov, and Mr. Mednick may be reached at telephone number (206) 553-1797 and electronic mail address mednick.richard@epa.gov. Please direct all contacts from FHA regarding the matter raised in this letter to either Mr. Liverman or Mr. Mednick with the caveat that have all contacts from counsel should be directed to Mr. Mednick.

Thank you for your prompt attention to this matter.

Sincerely,


Chris D. Field, Unit Manager
Emergency Response Unit

Enclosure

cc: Mike Traffalis
Tim Binder
Earl Liverman
Richard Mednick

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

IN THE MATTER OF:

Avery Landing Site
Shoshone County, Idaho,

Federal Highway Administration,

Respondent.

DOCKET NO. CWA-10-2011-DRAFT

ADMINISTRATIVE ORDER ON
CONSENT FOR REMOVAL
ACTIVITIES

Proceeding Under Sections 311(c) and
313(a) of the Federal Water Pollution
Control Act, as amended, 33 U.S.C. §§
1321(c) and 1323(a).

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent for Removal Activities ("Order") is issued pursuant to the authority vested in the President of the United States by Section 311 (c) of the Federal Water Pollution Control Act, also known as the Clean Water Act ("CWA"), as amended, 33 U.S.C. §1321(c). This authority has been delegated to the Administrator of the United States Environmental Protection Agency ("EPA") by Executive Order No. 12777, 58 FR 54757 (Oct. 22, 1991); and further delegated to the Regional Administrators by EPA Delegation No. 2-89 (Jan. 19, 1993); and to Region 10's Director, Office of Environmental Cleanup, by Regional Redesignations R10 2-89 (Aug. 8, 2005). This Order is issued to the Federal Highway Administration ("FHA") in furtherance of the responsibilities conferred by Sections 311(c) and 313(a) of CWA, 33 U.S.C. §§ 1321(c) and 1323(a).

2. This Order pertains to a discharge or substantial threat of a discharge of oil and hazardous substances on and from properties of the United States that are part of the Avery Landing Site located approximately one mile west of the town of Avery in Shoshone County, Idaho ("Site"). This Order requires the performance of actions by FHA to remove this discharge and mitigate or prevent this substantial threat of discharge of oil and hazardous substances into or on the navigable waters, on the adjoining shorelines to the navigable waters, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States.

3. The removal actions performed by FHA pursuant to this Order shall be subject to the direction and monitoring of EPA. These actions pertain to properties at the Site which are owned by the United States.

4. In computing any period of time under this Order, where the last day would fall on a Saturday, Sunday, or Federal Holiday, the period shall run until the close of business on the next working day.

5. Appendices A and B are incorporated by this reference into the Order. In the event of any conflict between this Order and either of the appendices, the Order shall control.

II. PARTIES BOUND

6. This Order applies to and is binding upon FHA, any persons acting on behalf of FHA, and the employees, agents, successors and assigns of FHA. Any change in status of FHA shall not alter the responsibilities of FHA under this Order. FHA shall ensure that its contractors, subcontractors, and representatives receive a copy of this Order and comply with this Order.

III. DEFINITIONS

7. Unless otherwise expressly provided herein, terms used in this Order and in the appendices attached hereto, which are defined in Section 311 of CWA, 33 U.S.C. § 1321, shall have the meaning assigned to such in that section of CWA. Further, whenever the terms below are used in this Order and in the appendices attached hereto, the following definitions shall apply.

a. "Action Memorandum" shall mean the decision document issued by EPA on March , 2011, attached as Appendix A hereto, setting forth the removal actions determined to be necessary for the Site;

b. "CWA" shall mean the Federal Water Pollution Control Act, as amended, commonly referred to as the Clean Water Act, 33 U.S.C. § 1251 *et seq.*;

c. "day" shall mean a calendar day unless expressly stated to be a working day;

d. "discharge" shall have the meaning set forth in Section 311(a)(2) of CWA, 33 U.S.C. § 1321(a)(2), and 40 C.F.R. Part 110.1;

e. "effective date" shall be the date that this Order is signed by EPA, following signature by FHA;

f. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States;

g. "FHA" shall mean the Federal highway Administration and any successor department or agency of the United States;

h. "hazardous substances" shall have the meaning set forth in Section 311(a)(14) of CWA, 33 U.S.C. § 1321(a)(14);

i. "navigable waters" shall have the meaning set forth in Section 502(7) of CWA, 33 U.S.C. § 1362(7), and 40 C.F.R. Part 110;

j. "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan, codified at 40 C.F.R. Part 300, including, but not limited to, any amendments thereto;

k. "onshore facility" shall have the meaning set forth in Section 311(a)(10) of CWA, 33 U.S.C. § 1321(a)(10);

l. "oil" shall have the meaning set forth in Section 311(a)(1) of CWA, 33 U.S.C. § 1321(a)(1);

m. "Order" shall mean this Administrative Order on Consent for Removal Activities and all appendices attached hereto;

n. "Paragraph" shall mean a portion of the Order identified by an arabic numeral;

o. "pollution" shall have the meaning set forth in Section 502(19) of CWA, 33 U.S.C. § 1362(19);

p. "Section" shall mean a portion of this Order identified by a roman numeral;

q. "Site" shall mean the Avery Landing Site located approximately one mile west of the town of Avery in Shoshone County, Idaho, and generally depicted on the diagram attached as Appendix B hereto; and

r. "working day" shall mean a day other than a Saturday, Sunday, or Federal holiday;

IV. FINDINGS OF FACT

8. From approximately 1909 until 1977, Chicago, Milwaukee, St. Paul & Pacific Railroad ("Railroad") owned and operated a facility at the Site. This operation included a refueling and maintenance station. Railroad was dissolved in a bankruptcy proceeding in 1985, and its successor corporation has been the subject of a bankruptcy liquidation proceeding ongoing since 2006.

9. The United States has held a fee simple ownership interest in properties at the Site since acquiring this interest by eminent domain in 1986. FHA has maintained jurisdiction and administration over these properties on behalf of the United States. FHA relocated, constructed, and reconstructed portions of the St. Joe River Road on these properties. Subsequent to this work, FHA conveyed an easement right-of-way interest to Shoshone County for operation and maintenance of the road, currently referred to as State Route 50.

10. Potlatch Forest Products Corporation ("Potlatch"), a private corporation, and Lawrence and Ethel Bencik ("Benciks"), husband and wife, each currently own property at the Site. The properties of Potlatch and Benciks are situated immediately adjacent to and between the St. Joe River and the properties owned by the United States.

11. The Site is located in a flat, filled bank along a bend on the St. Joe River. The St. Joe River has been designated by the State of Idaho ("State") as a special resource water that is used for wildlife habitat, recreation, and as drinking water for downstream residents. The bull trout and Canada lynx inhabit the river area around the Site and are among the species protected under Federal law. The groundwater at the Site flows in a southerly direction from the properties of the United States, Potlatch and Benciks toward the St. Joe River.

12. Discharges of oil have been observed on the St. Joe River along the banks of the Site at a variable but continuing rate since at least 1970. With oversight provided by the State, Potlatch has performed some work in an attempt to protect the St. Joe River from the further discharges of oil. In 1995 Potlatch constructed product recovery trenches and operated an oil water separator, and in 2000 Potlatch constructed a vertical barrier and installed collection wells. This work failed to prevent the continuing discharge of oil from the Site to the St. Joe River.

13. An Engineering Evaluation / Cost Analysis ("EE/CA") has recently been completed for the Site. The past data summarized in the EE/CA along with the data and other information gathered during the EE/CA shows there to be oil and hazardous substances in groundwater, surface water, sediments and subsurface soils throughout the Site, including the groundwater and soils on the properties owned by

the United States. In some locations oil has been observed to be floating on the groundwater, and in other locations the soils have been observed to be saturated with oil. The hazardous substances found at the Site include semi-volatile organic compounds, volatile organic compounds, metals and polychlorinated biphenyls.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

14. The Site is an "onshore facility" within the meaning of Section 311(a)(10) of CWA, 33 U.S.C. § 1321(a)(10).

15. The St. Joe River is "navigable waters" within the meaning of Sections 311(c)(1) and 502(7) of CWA, 33 U.S.C. §§ 1321(c)(1) and 1362(7), and 40 C.F.R. Part 110.

16. The upland areas along the St. Joe River at the Site are "adjoining shorelines to the navigable waters" within the meaning of Section 311(c)(1) of CWA, 33 U.S.C. § 1321(c)(1).

17. There has been, and continues to be, a "discharge" of "oil" and hazardous substances" to groundwater and soils at the Site and to surface waters and sediments adjacent to the Site within the meaning of Sections 311(a)(1), 311(a)(2), 311(a)(14) and 311(c)(1) of CWA, 33 U.S.C. §§ 1321(a)(1), 1321(a)(2), 1321(a)(14) and 1321(c)(1).

18. The activities undertaken pursuant to this Order will "remove" and result in the "removal" of oil and hazardous substances within the meaning of Section 311(a)(8) of CWA, 33 U.S.C. § 1321(a)(8)

19. The activities undertaken pursuant to this Order will provide for the "control and abatement of pollution" within the meaning of Sections 313(a) and 502(19) of CWA, 33 U.S.C. §§ 1323(a) and 1362(19).

20. There has been, and continues to be, a discharge and substantial threat of a discharge of oil and hazardous substances from properties of the United States at the Site into or on the navigable waters, on the adjoining shorelines of the navigable waters, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States within the meaning of Sections 311(a)(2) and 311(c)(1) of CWA, 33 U.S.C. § 1321(a)(2) and 1321(c)(1), and 40 C.F.R. Part 110.1.

21. FHA administers and has jurisdiction and control over properties at the Site that are owned by the United States.

22. EPA may direct and monitor the Federal actions of FHA which are deemed necessary by EPA to remove a discharge of oil and hazardous substances and mitigate or prevent a substantial threat of discharge of oil and hazardous substances on or from the properties of the United States at the Site as provided by Section 311(c)(1) of CWA, 33 U.S.C. § 1321(c)(1).

23. FHA is an instrumentality of the Federal Government which has jurisdiction over properties at the Site and is thereby subject to requirements determined to be necessary by EPA for the control and abatement of water pollution as provided by Section 313(a) of CWA, 33 U.S.C. § 1323(a).

24. The removal actions required by this Order are in accordance with the NCP, and are necessary to ensure effective and immediate removal or prevention of a discharge or a substantial threat of discharge of oil and hazardous substances into or on the navigable waters, on the adjoining shorelines to the navigable waters, or that may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States within the meaning of Section 311(c)(1) of CWA, 33 U.S.C. § 1321(c)(1).

VI. WORK TO BE PERFORMED

25. FHA shall perform the work necessary to complete the tasks described below in accordance with this Order, the NCP, and applicable EPA requirements and guidance including, but not limited to, "EPA Requirements for Quality Assurance Project Plans (QA/R-5)" (EPA/240/B-01/003, March 2001) and "EPA Guidance for Quality Assurance Project Plans (QA/G-5)" (EPA/600/R-98/018, February 1998).

26. Within ten (10) days of the effective date of this Order, FHA shall identify a contact person to be referred to as the "Project Coordinator" who shall be responsible for performance of the removal actions

27. FHA shall remove soils contaminated by oil and hazardous substances from properties of the United States at the Site and dispose of these soils in accordance with the Action Memorandum.

28. Within one hundred and twenty (120) days of the effective date of this Order, FHA shall participate in a project planning meeting with EPA. During this meeting, FHA and EPA will outline the major managerial decisions and responsibilities to be addressed in a Work Plan, including a schedule and general design and cleanup submittals. Within sixty (60) days of this meeting, FHA shall provide EPA with a Work Plan for the removal and disposal of contaminated soils. The Work Plan shall include a schedule for performance of the removal action tasks and for submittal of plans or reports as identified during the project planning meeting.

29. FHA shall provide the Work Plan and all other submittals required by this Order to the Federal On-Scene Coordinator ("OSC"). Unless otherwise specified in writing by EPA, the OSC shall be the following individual:

Earl Liverman
Federal On-Scene Coordinator
U.S. EPA Region 10
Coeur d'Alene Field Office
1910 Northwest Boulevard, Suite 208
Coeur d'Alene, Idaho 83814
liverman.earl@epa.gov
(208) 664-4858

30. Following review of the Work Plan, the OSC may modify or revise any portions thereof. FHA shall implement the approved Work Plan, including any modifications or revisions thereto which are made by the OSC, in accordance with the written approval of EPA. Once approved in this manner by EPA, the Work Plan and all portions thereof shall be enforceable as requirements under this Order.

31. FHA shall submit a written progress report to the OSC concerning actions undertaken pursuant to this Order in accordance with the Work Plan, unless otherwise directed in writing by the OSC. The progress reports shall include the following information:

- a. a description of all significant developments during the preceding period, including the work performed and any problems encountered;
- b. copies of the analytical data received during the reporting period; and
- c. a description of developments anticipated during the next reporting period, including a schedule of the work to be performed, anticipated problems, and planned resolutions of past or anticipated problems.

32. Modifications to any plan, report or schedule required by this Order may be made in writing by the OSC or at the OSC's oral direction. If the OSC makes an oral modification, it will be memorialized in writing, provided, however, that the effective date of the modification shall be the date of the OSC's oral direction.

33. Within sixty (60) days of completion of all on-Site activities, FHA shall provide a final written report to the OSC detailing all work completed, and shall include with this report copies of all analytical and monitoring data, disposal records, and other documentation related to the removal actions required by this Order.

34. Following review of the final report, EPA will notify FHA either that all removal actions have been fully performed in accordance with this Order, or that there remain uncompleted obligations. Along with this latter notice, EPA will provide a list of the uncompleted obligations and a schedule for completing this work. FHA shall thereafter undertake this work in accordance with the notice and schedule provided by EPA. Following the completion of all on-Site portions of this work, FHA shall submit a final report as specified in Paragraph 34.

35. Beginning on the effective date of this Order, and continuing thereafter until notified otherwise by EPA, FHA shall provide EPA and its contractors and authorized representatives with access to the properties of the United States at the Site, and to any other areas where access is necessary to implement this Order.

VII. RESERVATION OF RIGHTS

36. This Order does not preclude EPA from taking any action authorized by CWA, OPA, the NCP, or any other applicable law. EPA reserves the right to take or direct action to protect the public health or welfare or the environment. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Order, from taking other legal or equitable action as deemed appropriate and necessary, or from directing FHA in the future in the performance of additional activities pursuant to CWA or any other applicable law.

37. Notwithstanding any other provision of this Order, at any time during the removal actions, EPA reserves the right to perform its own studies, complete the removal actions, and seek reimbursement for its costs, or seek any other appropriate relief. Nothing in this Order shall limit the authorities of the OSC as outlined in the NCP.

38. Any failure of FHA, without sufficient cause, to comply with this Order may subject FHA to a requirement to pay costs as provided in the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2701 *et seq.*

39. Any requirement for the payment or obligation of funds by FHA established by the terms of this Order shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341. In cases where payment of obligation of funds would constitute a violation of the Anti-Deficiency Act, the dates established requiring the payment of obligation of such funds shall be appropriately adjusted. If appropriated funds are not available to fulfill the obligations of FHA under this Order, EPA reserves the right to initiate an action against any person, including, but not limited to, Potlatch or Shoshone County, or to take any response action.

VIII. DISPUTE RESOLUTION

40. If a dispute between FHA and EPA should arise under this Order, the procedures of this Section shall be employed to resolve the dispute.

41. The OSC and Project Coordinator shall always make reasonable efforts to resolve a dispute. Nevertheless, if FHA objects to an action, determination or direction by EPA, including any disapproval, modification or other decision made hereunder, FHA shall notify EPA in writing of such objection within twenty (20) days of the action, determination or direction. This notice shall set forth the specific points of the dispute, the position which FHA asserts should be adopted as being consistent with the requirements of this Order, the basis for the position of FHA, and any other matters which FHA considers relevant to resolution of the dispute. Representatives of EPA and FHA shall have fifteen (15) days from receipt by EPA of a notice of objection to attempt to resolve the related dispute. If a resolution is reached within this 15-day period, the resolution shall be reduced to writing and signed by the OSC and Project Coordinator. Each such written resolution to a dispute shall be incorporated into and enforceable under this Order.

42. If the OSC and Project Coordinator are not able to resolve the dispute as provided in Paragraph 41, the dispute shall be referred to the Director of the Office of Environmental Cleanup of EPA, Region 10, and the Division Engineer of the Western Federal Lands Division of FHA. These officials shall have ten (10) days from this referral to resolve the dispute and issue a mutual written decision. If these officials cannot reach a mutual accord within this 10-day period, the Director of the Office of Environmental Cleanup of EPA, Region 10, will issue a written decision resolving the dispute. This decision will be provided to FHA and shall be incorporated into and enforceable under this Order.

43. The obligations of FHA under this Order shall not be tolled by the initiation of any dispute. Following the resolution of a dispute in accordance with this Section, FHA shall fulfill the requirements that were the subject of the dispute in accordance with the resolution reached under Paragraph 41 or 42.

IX. EFFECTIVE DATE

45. The effective date of this Order shall be the date of signature by EPA.

IT IS SO AGREED

BY: _____
Clara Connor, Division Engineer
Federal Highway Administration
Western Federal Lands Highway Division

IT IS SO ORDERED AND AGREED

BY: _____
Daniel D. Opalski, Director
Office of Environmental Cleanup
U.S. EPA Region 10

DATE: _____

